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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

NO. 917

ROOFTRE ALARM COMPANY
Petitioner,

vs.

UNDERWRITERS' LABORATORIES, INC.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Respondent, Underwriters' Laboratories, Inc., opposing the petition for writ of certiorari, would respectfully show the Court:

OPINIONS BELOW

The District Court's 1959 opinion is found at page 753 of 188 F. Supp., not at page 783 as stated in the Petition. As stated in the Petition, the 1960 opinion of the Court of Appeals for the Sixth Circuit (App. B. of Petition) is reported at 284 F. 2d 360 and the 1966 Order of the Court of Appeals for the Sixth Circuit denying Petitioner's Motion to Be Relieved of Final Judgment (App. C of Petition) is not reported.

JURISDICTION

The jurisdictional requisites to petition from the Court of Appeals' Order of October 11, 1966 denying Petitioner's Motion to Be Relieved of Final Judgment are set forth in the Petition. This Court lacks jurisdiction, however, of any attempt by petitioner, under the guise of such a Motion, to have this Court do indirectly what it could not do directly—review an Order of the Court of Appeals rendered in October, 1960, over six years ago, by granting the Petition for a Writ of Certiorari.

QUESTIONS PRESENTED

Petitioner's "Questions Presented" are unsatisfactory because they are (i) misleading[1] and (ii) irrelevant.[2]

The "Questions Presented" really consists of one question: Where (i) a case was decided against petitioner by the District Court in 1959 on two independent grounds and was affirmed by the Court of Appeals in 1960, (ii) in September, 1966, almost six years later, petitioner filed in the Court of Appeals a "Motion to Be Relieved of Final Judgment" under Rule 60(b), Federal Rules of Civil Procedure, which attempts to inject most belatedly a wholly irrelevant issue, and the Court denied that Motion on October 11,

[1] They suggest that Respondent has recently obtained a tax exempt status under the Internal Revenue Code. As is clearly indicated in Appendix D to the Petition, respondent has had such a status since 1954 and petitioner specifically referred to that 1954 exemption in its brief to the Court of Appeals in 1960.

[2] The apparent basis of the Petition and the Motion—Respondent's tax status—was not at issue in the original case and is not here.

1966, and (iii) petitioner then filed its Petition for a Writ of Certiorari contesting the 1966 Order on a record consisting almost solely of the published 1959 and 1960 decisions and the self-serving assertions of petitioner in its Motion and brief below, should this Court now review the Court of Appeals' refusal to reopen its 1960 Judgment?

STATEMENT OF THE CASE

As the 1959 District Court opinion points out, Underwriters' Laboratories, Inc. is a non-profit corporation engaged in testing various materials and devices to determine if they meet safety standards established by the Laboratories. Those devices which meet its standards are listed by the Laboratories.

Petitioner is the licensee of a patented fire alarm device consisting of two carbon dioxide filled capsules enclosed in a metal tube with crimped ends. According to the District Court, the capsules explode when heated, thus warning people in the vicinity. The device was presented to the Laboratories and tested. It was found not to meet its standards for single station fire alarms, one requirement of which is that "the warning sound continue for at least three minutes at full intensity."[3]

This Petition is petitioner's third attempt to compel respondent to recognize petitioner's would-be fire alarm device. As the summary record indicates, petitioner contends that the Laboratories, having previously tested petitioner's device and found it not to meet its standards for single

[3] The purpose of such a requirement is obvious. A sleeping person may fail to be aroused by one or two reports or may believe he heard a backfire or other street noise.

station fire alarms, has an obligation to test again the device and to inform the world that the device fails to meet Laboratories' requirements.

The first attempt was in the case of *Roofire Alarm Co.* v. *Underwriters' Laboratories, Inc.* (E. D. Tenn., 1959), 188 F. Supp. 753, *aff'd,* 284 F. 2d 360, in which defendant's motion for summary judgment was upheld. No petition for writ of certiorari was filed. The District Court there held that the Laboratories did not have an obligation to test and report on petitioner's device and that, in any event, the requirements of the Laboratories were reasonable and were not met by petitioner's device.

The second attempt was poorly disguised as a restraint of trade suit, *Roofire Alarm Co.* v. *Royal Indemnity Co.,* 202 F. Supp. 166, *aff'd,* 313 F. 2d 635, *cert. denied,* 373 U.S. 949, 83 S. Ct. 1678, 10 L. Ed. 2d 704, in which defendant's motion for summary judgment was again upheld, the District Judge commenting, ". . . plaintiff's real purpose . . . is to require Underwriters' Laboratories, Inc. to list . . . (the) device in its publications . . ." (202 F. Supp. p. 170).

In June, 1966, petitioner again tried to get respondent to retest the device and report on it. (Petition, p. 4.) Because the device does not meet respondent's standards (Petition, App. A, p. 10, last paragraph), respondent, relying on the holdings of the Courts in the above two cases, refused to go through the useless motions of testing it. Petitioner thereupon for the third time tried to compel respondent to retest it, by filing a motion under Rule 60(b) asking the Court of Appeals to reconsider and reverse its 1960 holdings in the *Underwriters'* case, supra. The ground alleged is that it is inequitable for respondent to rely on the Court opinions, purportedly because of a change in tax status.

Respondent has been exempt from federal income taxes under 26 U.S.C. 501(c)(3) as an organization "testing for public safety," since the 1954 Internal Revenue Code. The statement in the last paragraph of "Statement Of The Case" (Petition, p. 4) that (inferentially, after 1960) "the Laboratories' position has reversed from that of a non-exempt corporation to that of a public welfare tax-exempt corporation," accordingly, is untrue.

ARGUMENT

Petitioner has not attempted to show that its Petition conforms to Rule 19 of this Court because it cannot.

A motion based upon Rule 60(b) is addressed to the sound discretion of the court, *Flett* v. *W. A. Alexander & Co.*, 302 F. 2d 321 (7th Cir. 1962), *cert. denied*, 371 U.S. 841 (1962). That discretion was exercised adversely to petitioner on October 11, 1966. Since the time to petition for a writ of certiorari to review the 1960 judgment ran years ago, this petition can properly request review only of the 1966 order, and not the 1960 judgment. See *Demers* v. *Brown*, 343 F. 2d 427 (1st Cir. 1965), *cert. denied*, 382 U.S. 818 (1965). Indeed, this Court would not grant a petition to review that 1960 judgment. When the time for filing a petition for writ of certiorari has expired, this Court's jurisdiction to grant the petition ceases, *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399 (1923); *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952).

There is not, therefore, nor can there be, any federal question of any significance raised by the Petition. The only question raised is whether this Court should review whether the Court of Appeals abused its discretion by refusing to reopen a judgment it had rendered six years before.

Under Rule 60(b) a court can alter or amend a previous judgment if it is inequitable that the judgment have prospective application. Moore's Federal Practice, 2d Ed., Vol. 7, pages 283, et seq., Sec. 60.26(4), states the principal situation in which the rule has been applied is where an injunction has been granted and the grounds for continuing the injunction no longer exist or the specific rule of law on which the injunction was based has been changed either by a court decision or legislative action. Obviously, neither of these situations is present. No injunction was granted against petitioner forbidding it to apply to respondent at any time to have the device tested. The converse is true. Petitioner seeks, in effect, a mandatory injunction requiring respondent to test the device.

Even if a significant federal question were presented, it would not merit review in this case. Justice Frankfurter discussed certiorari in *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 918 (1950):

> "Pertinent considerations of judicial policy have come into play. A case may raise an important question but the record may be cloudy."

Here the record is more than cloudy; it is virtually nonexistent and consists almost entirely of petitioner's unsupported assertions.

Petitioner has attempted to challenge the prior judgments by suggesting that respondent's tax status creates some sort of judicial question. That status remains the same as it has been since 1954 and as petitioner knew it to be before all of its litigations against the Laboratories.

Moreover, despite petitioner's preoccupation with tax status, this is not a tax case. The 1954 Internal Revenue Code granted petitioner no rights against respondent nor

did it require respondent to test and list a device which did not meet its reasonable requirements.

Petitioner has more than had its day in court. As stated by this Court in *Bullock* v. *South Carolina,* 365 U.S. 292 (1961): "the totality of circumstances as the record makes them manifest . . . (does) not warrant bringing the case here. . . ."

Respondent respectfully submits that the Petition is without any semblance of merit and should be denied.

Respectfully submitted,

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